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# Truth and Its Rivals in the Law of Hearsay and Confrontation

by  
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In this paper, I will look at the problem of hearsay and confrontation through the lens offered by this symposium's theme of "truth and its rivals." I will ask: To what extent does the law of hearsay and confrontation aspire to achieve the goal of truth in litigation? To what extent does it, or should it, seek to achieve other goals, or to satisfy other constraints on the litigation system? And, given the ends that it seeks to achieve, what should the shape of the law in this area be?

My principal conclusions are as follows: In most settings, the law of hearsay should be concerned nearly exclusively with achieving the goal of truth determination, subject to constraints related to the cost of litigation. For the most part, the current law of hearsay does a poor job in this respect and even is sometimes counterproductive. In one setting of great importance, what I will call the confrontation setting, the law in this area has a great service to perform. That service—protecting the conditions under which testimony against an accused is taken—bears some relation to truth determination but is not dominated by it and has very little to do with cost considerations. In this context, the United States Supreme Court has generally been insufficiently protective of the accused's rights, regarding hearsay law as an old-fashioned nuisance that must be tolerated to a minimal extent but that should be kept firmly in its place.

To provide some groundwork for my discussion of hearsay topics, I will address rather briefly the general theme of "truth and its rivals."

## I. Truth and Its Rivals: Goals and Constraints

I remember that at an evidence conference in 1991, one of the participating scholars—I do not remember who—asked who in the audience accepted the proposition that determination of truth is the principal goal of the adjudicative system. The questioner clearly believed the proposition to be true and found it frustrating that many people did not. My own view is a qualified one. I do accept that the

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attempt to determine the truth is the principal *goal* of adjudication. But to say this does not get us very far because adjudication must operate subject to various significant *constraints*, some of which derogate the search for truth.

I will not discuss the philosophical questions of whether there is such a thing as truth, or what it is. For that matter, I will not focus on the narrower question of the distinctions between fact and law, or between fact and norm.<sup>1</sup> Trials, and hearsay law, concern principally an inquiry into what happened,<sup>2</sup> and the truth, for our purposes, is what in fact happened.<sup>3</sup> Now obviously, we may never know what happened, and even if we do our characterizations of any event are heavily laden by our perspectives and values.<sup>4</sup> But these problems do not change the fact of what happened. The green car was going however fast it was going, and that speed is a fact, whether we say that it was going slowly, at a reasonable rate of speed, at 40 miles per hour, or too fast.

In thinking about the goals of litigation, I want to first pose an unreal, almost utopian world. Suppose we had easy, costless access to the Great Omniscience (G.O.), who knows fully the facts of any litigated dispute and can report them with complete accuracy in language that legal decisionmakers could understand. Would we not readily agree to depend on his reports, instead of having to go through the rigamarole of trial?<sup>5</sup> Even if the G.O., understanding and exploiting his monopoly position, decided to charge us what it would cost to have a trial, we would find the deal a good one because his product is better. This system of adjudication would not offer us any benefits *other than* perfect accuracy in fact-finding, but that is a benefit of enormous value, and it makes the system worthwhile.

There are other goals that may be achieved by trials, but I do not

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1. I am using the term "norm" in the sense of a prescribed standard of conduct or decision, such as "reasonable care."

2. To some extent, trials also concern what will likely happen in the future, or what would likely happen given some set of conditions. For example, in a torts action, if the plaintiff demonstrates liability, damages for lost earnings equal the amount by which plaintiff's anticipated *future* earnings are less than the earnings the plaintiff likely *would have had* if the tort had not been committed.

3. See generally MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 94-95 (1997).

4. See generally WILLIAM TWINING, *Some Scepticism about Some Scepticisms*, in RETHINKING EVIDENCE: EXPLORATORY ESSAYS 92-152 (1990). Twining explores a range of skeptical views, including "philosophical scepticism," referring to "fundamental doubts about the *possibility* of knowledge or of reason or of objective values." *Id.* at 94-95.

5. Medieval adjudication made this choice: Evidence-dependent adjudication was not necessary because mechanisms like the ordeal were thought to reveal the word of God. If we still had the old-time religion, the ordeal would still be a good means of decisionmaking.

believe that they need to corrupt the fact-finding mission in this hypothetical world. I will discuss in turn the goals of determination of norms, dispute resolution, satisfaction of the parties, general acceptance of litigation results, and fairness.

The system I have described does not assist us in determining norms—that, says the G.O., is not his job. It may well be that we cannot adequately determine the norms that should govern in a particular factual setting except when the setting is actually presented; concrete cases focus the mind. And it may be—at least in criminal cases, and, in the United States, in many civil cases as well—that we positively prefer some of these particularistic norms to be made by a jury. So norm determination is a goal that we should attempt to achieve, in part, through trials. But that task, as I have suggested, is conceptually a severable one from fact-finding. If the G.O. could give us “just the facts,” we could submit them to a jury to ask, subject to whatever constraints appear appropriate, what the consequences of those facts should be: “You have heard what the doctor did. Now you must decide whether this should be deemed reasonable care.”

Another goal that has been cited for litigation is dispute resolution.<sup>6</sup> It may be that in some sense this goal takes precedence over the goal of truth determination. If the parties resolve their entire dispute, the court does not ordinarily require that they nevertheless litigate to determine the facts, and if they wish to put aside part of a potential dispute, by stipulating to some fact, the court will not usually examine the stipulated fact with care to determine whether it is indeed true. Nevertheless, I believe that determination of the truth is the best way the adjudicative system can contribute to dispute resolution. Suppose the parties have confidence that, if allowed to play out to the fullest, the adjudicative system will in all likelihood determine the truth. Then the adjudicative system may wisely let the chips fall where they may, allowing the parties to resolve their dispute by invoking the adjudicative system to whatever extent they find appropriate.<sup>7</sup>

Similar arguments can, I believe, be made with respect to the potential goals of satisfaction of the parties and general acceptance of the results of the litigation. If the Great Omniscience is able to guarantee accurate and inexpensive results, those results will usually

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6. See DAMAŠKA, *supra* note 3, at 110-24 (contending this is the principal objective of both civil and criminal litigation in the common law system); Twining, *supra* note 4, at 131-32 (referring to this view as a species of “nature-of-the-enterprise” skepticism and emphasizing that to be plausible it must make room for concepts such as “rectitude of decision”).

7. I explore this point further in another article. Richard E. Friedman, *Anchors and Flotsam*, 107 YALE L.J. 1921 (1998).

gain broad acceptance. Prevailing parties will presumably be satisfied and, while losers may complain, they have nothing valid to complain about because they deserved to lose.

For much the same reason, the goal of fairness does not seem to conflict with truth determination in this idealized world. Results are perfectly accurate, so there is no concern about an intolerable distribution of erroneous results. And there does not seem to be any unfairness in process, for the adjudicative system has simply consulted an omniscient factfinder.

So this little exercise suggests that, in an ideal world, determination of truth is the pre-eminent, if not the exclusive, goal of adjudication—the only goal that we need worry about. But as we move from this ideal world to the real world, we must be careful of the problem of the “second best,” which warns us that if an ideal state is not attainable a move in the direction of achieving any given part of that ideal state is not necessarily optimal.<sup>8</sup> This problem suggests that truth determination need not necessarily be preeminent in the far from ideal world of litigation in which we actually live. Perfect accuracy in fact-finding is not attainable, at least not without intolerable cost. The goals of dispute resolution, general acceptance, party satisfaction, and fairness—all of which would, I have argued, be achieved naturally in a world of perfect fact-finding—will not necessarily be achieved in the real world. We may, therefore, have to engage in tradeoffs between these goals.

I believe, though, that much of what I have said carries over to the real world. Improving accuracy in truth determination will tend in most situations towards the achievement of these other goals. I do not mean that truth determination will be optimized by the same system that will optimize the other goals; I do mean that, starting from any given point, a change that improves the system's truth-determining capacity is likely to be neutral or better with respect to the other goals. Put another way, a change that makes the system a less satisfactory mechanism for truth determination is usually unlikely to improve it along any of the other dimensions. Only with caution, therefore, should we decline to optimize truth determination in deference to one of the other goals.

The goal of fairness warrants particular attention. Arguably, the allocation of errors is one aspect of fairness. That is, one might say that a system that yields errors disproportionately favoring one side to the litigation is not fair. This is an interesting question, and I cannot go into it in depth here. But here is a brief perspective, based on decision theory. My view is that, at least for the most part, we

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8. See, e.g., Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom?*, 95 MICH. L. REV. 2498, 2632 & n.148 (1997).

need not worry about allocation of errors as such, and that instead our goal should be to minimize the cost of errors—or more precisely, to maximize the expected value of the outcome of our adjudicative system.

Let us say that we count an inaccurate result for the plaintiff in a civil case as being as bad as an inaccurate result for the defendant (and an accurate result for one as being as good as an accurate result for the other). Given these assumptions, if a proposed change in the system would eliminate pro-plaintiff errors more than it would create pro-defendant errors, then that change maximizes expected value, and it ought to be made—no matter what (or at least almost no matter what) the prior allocation of errors. I believe fairness as well as accuracy demands this result. It is not fair to the defendant to refuse to make such a change, which offers an attractive tradeoff in truth determination. By the same token, in a criminal case, because pro-prosecution errors are so much worse than pro-defense errors, a change that would decrease pro-prosecution errors should be made even if it would increase the number of pro-defense errors by many times more.<sup>9</sup> Even though such a change would increase the total *number* of errors, it would (unless the number of additional pro-defense errors is extravagantly large in relation to the diminution of pro-prosecution errors) decrease the total *cost* of the errors. Thus, it would be a net benefit to truth determination.

I will introduce a slightly mathematical statement to crystallize this point. Suppose we are operating in system A and are considering a change to system B. It can be shown reasonably simply that under the decision-theoretic perspective, a change to system B is preferable if and only if

$$\frac{\text{Probability that B will avoid a pro-opponent error}}{\text{Probability that B will avoid a pro-proponent error}} > S$$

where the proponent is the party favored by the change to system B and the opponent is that party's adversary; an error means a factually inaccurate result; and S is the standard of persuasion, or the level of confidence, expressed in odds, that the factfinder must have in favor of the proponent in order to find for the proponent (more likely than not for the plaintiff in the usual civil case, beyond a reasonable doubt

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9. I have explored these ideas in an unpublished paper called *Truth and Fairness in Adjudication* (unpublished manuscript, on file with the author). I believe my conclusion is basically in accord with that of Michael L. DeKay, *The Difference Between Blackstone-Like Error Ratios and Probabilistic Standards of Proof*, 21 LAW & SOC. INQUIRY 95 (1996).

for a criminal prosecutor).<sup>10</sup>

I think this simple expression offers an interesting way of looking at probative value and prejudice, examining the impact of the evidence on the fact-finding result. Suppose that systems A and B are identical except that B allows the admissibility of an item of evidence offered by the prosecution that A does not. Then the numerator of the fraction may be regarded as the probative value of the evidence, and the denominator may be thought of as the prejudicial impact. That is, the numerator represents the good impact the evidence has in reducing errors in favor of the opponent, here the defendant, and the denominator represents the bad impact of the evidence in increasing errors in favor of the proponent, here the prosecution. Only if the ratio of these two is greater than  $S$ —which, given that the proponent is a prosecutor, is very high—is system B superior.

I have said that I believe that considerations of error allocation need enter in only slightly, at most, in determining the merits of an adjudicative system. But there are aspects of the process as well that might also be considered matters of fair treatment of the parties. We would not, for example, allow the evidentiary use of a confession procured by torture, even if we were persuaded that it is more probative than prejudicial. The confrontation right, which I will address in this paper, is another example of such a constraint that operates in derogation of truth. And there are other constraints as well, most notably the matter of cost, that could not be deemed to be aspects of fairness.

## II. Ordinary Hearsay

Now I will become less abstract and focus on hearsay. First, I will address ordinary hearsay—that is, hearsay that clearly does not present any confrontation issue. As to such hearsay, I believe that truth determination ought to be the principal concern determining admissibility, that current doctrine does a poor job reflecting this concern, and that fairness concerns are not powerful and should not lead to a general rule of exclusion.

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10. Somewhat more elaborately, B is preferable to A if

$$\frac{P_{AP} - P_{BP}}{P_{BP} - P_{APo}} > S$$

where  $P_{Kj}$  is the probability under system K that the factfinder will find for party i and in fact party j is entitled to the verdict.

### A. The Unavailable Declarant

I want to address hearsay first by considering a rather austere setting that does not involve confrontation rights, or the respective abilities of the parties to produce the declarant as a witness, or any suggestion that the out-of-court declaration was made for the purpose of creating evidence, or that the declarant was kept away from court by the contrivance of one of the parties.

Suppose that in a civil case, *Peters v. Decker*, Peters claims that she and Decker entered into an oral contract, in face-to-face discussions, on the morning of July 5, 1997, and that Decker testifies, denying that he and Peters even met on that date. Peters offers the testimony of Whitley that her husband Henry casually said to her on the evening of that date, "I saw Peters this morning. She was talking with Decker about something." Whitley is quite sure about the date because the next morning Henry died of a heart attack—under utterly unsuspecting circumstances.

Henry's statement seems clearly to be hearsay.<sup>11</sup> An American court would have to consider whether it fits within any of the standard exemptions from the law of hearsay, such as those enumerated in FED. R. EVID. 803 and 804. It appears not to. The court would then have to consider whether nevertheless it ought to admit the statement under its residual authority, now expressed in Rule 807, to relieve some statements from the ban on hearsay. The court might or might not apply the residual exception.

I think this is a bad system. I think the probable result—exclusion—is silly. I think the indeterminacy—because, after all, the residual exception *might* be invoked—is unfortunate.<sup>12</sup> Not only is the likely decision under current law unfortunate but also the structure of decision—a broad presumptive rule of exclusion, qualified by a long list of particular, often complex exemptions, supplemented by residual authority to admit—is gratuitously complex. But for now, my principal complaint is with neither the likely decision nor even the structure of decision; rather, it is that the basic criteria of decision are misplaced.

Under the received wisdom, the principal criteria that shape most of the hearsay exemptions are trustworthiness and necessity.<sup>13</sup> These criteria are reflected in the residual exception as well: That

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11. See FED. R. EVID. 801(c).

12. Under the system I propose, although there would not be any rule requiring admissibility, that would still be the highly predictable result. Hence, the practical indeterminacy of the system would be greatly reduced.

13. See 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1420-1423 (James H. Chadbourn rev. ed., 1974).



exception depends, most significantly, on whether the statement has considerable "circumstantial guarantees of trustworthiness" and whether it is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."<sup>14</sup>

For now, I will postpone consideration of need and focus on the criterion of trustworthiness or, synonymously, reliability. This is a bad criterion, for at least three reasons.<sup>15</sup> Perhaps most obviously, it is notoriously difficult to determine, especially across a broad category of cases. I think few lawyers are satisfied with the cracker-barrel psychology that underlies exceptions like the one for excited utterances.

Second, the trustworthiness criterion appears to put the cart before the horse. If the question genuinely is trustworthiness, we are asking whether the proposition the statement asserts is highly likely to be true. But that depends on all the other evidence in the case. At the admissibility stage, the court should not generally be required to determine whether a litigated proposition is true; that is a matter to be decided at the end of the case and by the jury, if there is one.<sup>16</sup>

In *Idaho v. Wright*, the Supreme Court interpreted the trustworthiness criterion in a way that diminishes this latter problem.<sup>17</sup> Under the Court's interpretation (made in the confrontation context), trustworthiness does not mean whether, on the basis of all the evidence, the particular statement appears highly likely to be true; rather, it means whether the circumstances surrounding the making of the statement tend to suggest that it was truthful.<sup>18</sup> This cropped

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14. FED. R. EVID. 807.

15. See also Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43, 95 (1994) (arguing on related grounds that "[p]remising exceptions on rulemakers' categorical judgments of reliability or trustworthiness is flawed in several ways").

16. I do not contest the point, illustrated notably by *Bourjaily v. United States*, 483 U.S. 171 (1987), that the court might sometimes be required, as a threshold matter in deciding the admission of evidence, to determine the truth of a factual proposition that happens to be similar or even identical to a proposition that the jury must decide in determining the merits of the action. For example, in *Bourjaily*, the court had to determine the existence and membership of a conspiracy for purposes of deciding whether an offered statement fit within the hearsay exemption for statements by conspirators; the jury also had to determine similar questions in deciding guilt on the merits. In such a case, the congruity is, in a sense, fortuitous; the court and the jury must determine similar facts, but only because the law governing the court's decision on the evidentiary question and the jury's decision on the merits happen, perhaps for very different reasons, to make the same or similar propositions material. It is an altogether different matter to say that, in determining whether the jury should hear evidence offered to prove a proposition that the jury must decide, the court must first decide whether, in light of that evidence, the proposition is most likely true.

17. *Idaho v. Wright*, 497 U.S. 805 (1990).

18. See *id.* at 820-23.

inquiry, however, aggravates the problem of trying to assess the probative merits of a piece of evidence by placing it in one category or another; it means that courts must determine trustworthiness on the basis of generalizations.

Perhaps most importantly, the trustworthiness criterion does not reflect well whether the statement is net beneficial to truth determination. A piece of evidence can be helpful to truth determination even if it is not particularly reliable. As the old line goes, a brick is not a wall,<sup>19</sup> and a single piece of evidence can contribute significantly to fact-finding even though it could not bear the weight of the whole case. Suppose, for example, that three eyewitnesses independently describe an accident similarly. The conjunction does not dispel all doubt, for the three may have been making a common mistake, but it is certainly stronger than the testimony of a sole witness. Note that the paradigm of acceptable evidence—live testimony subject to cross-examination—is not reliable. If it were, we would rarely have a dispute in testimony.

This point may be put in more formal terms by using the concept of the likelihood ratio. The likelihood ratio of a piece of evidence with respect to a given proposition is the ratio of the probability that the evidence would arise, given that the proposition is true, to the probability that the evidence would arise given that the proposition is false. If a statement favoring a litigated proposition has a likelihood ratio with respect to that proposition that is not a very large number—so that the evidence is not many times more likely to arise given the truth of the proposition than given its falsity—we cannot ordinarily say that the statement is trustworthy. We certainly cannot do so if, following the Supreme Court in *Wright*, we are unwilling to let corroborative evidence enter into the determination of trustworthiness. But such “untrustworthy” evidence may have significant probative value. For example, suppose that absent Henry’s statement the jury would assess the odds that Peters and Decker met on July 5 as 2:3, and that it would assess the likelihood ratio of Henry’s statement with respect to the proposition as 2. That means that the jury believes Henry is just twice as likely to have made the statement if it was true as if it was false, and that the odds that the proposition is true, taking into account both the statement and all the other evidence, are 4:3. By neither standard should the statement be considered trustworthy—and yet it clearly has very significant probative value.<sup>20</sup>

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19. See FED. R. EVID. 401 advisory committee’s note (citing MCCORMICK ON EVIDENCE § 152 at 317 (1st ed. 1954)).

20. By Bayes’ Theorem, the odds of the proposition given the evidence are equal to the odds of the proposition absent that evidence times the likelihood ratio of the evidence

The underlying test for truth determination is not whether the evidence is trustworthy, but whether it is more probative than prejudicial. Despite the objections I have voiced, trustworthiness would nevertheless be a useful criterion for truth determination if it sorted out evidence that satisfies this test from evidence that fails it. But there is no reason to believe that trustworthiness performs this task.

What is the danger of prejudice with respect to hearsay? The danger that has frequently been articulated since the early nineteenth century—but not before, it appears—is that the jury will be unable to evaluate the hearsay without the procedural incidents that we associate with live testimony: cross-examination, demeanor, and the oath.<sup>21</sup> (It may be in large part because of this perceived danger that the rule against hearsay evidence tends to be eased, or even abrogated, in civil bench trials in the common law system.<sup>22</sup>) Thus, according to this argument, trustworthiness is a safe harbor: If the adjudicative system believes that the statement at issue is highly trustworthy, then the jury cannot be making a mistake in overvaluing the evidence because a rational factfinder *ought* to value the evidence as highly as—or even more highly than—live testimony by the same declarant of the same proposition.

I think that there is a plausible argument that each of these procedural incidents of live testimony does help a factfinder sort out true statements from false, in part because they tend to inhibit false testimony more than they do true testimony. But what basis is there to believe that absent these incidents hearsay statements would presumptively have more of a bad impact on a jury than a good one? Let's look separately at both sides of the problem, first probative value and then prejudice.

Most hearsay has substantial probative value, assuming the declarant's live testimony of the same proposition would. As assessed from the perspective of the adjudicative system, an out-of-court statement might lack some probative value that live testimony would have by virtue of the extra information conveyed by the incidents of testimony. But an ideal factfinder, suitably discounting for the absence of those incidents, would still grant substantial probative value to a statement like Henry's. A person other than a pathological

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with respect to the proposition.

21. See Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 1, 36 (1942).

22. See, e.g., Civil Evidence Act, 1995, ch. 1 (Eng.) (eliminating rule against hearsay as an exclusionary rule in civil cases); THE LAW COMM'N FOR ENGLAND AND WALES, CONSULTATION PAPER NO. 117, THE HEARSAY RULE IN CIVIL PROCEEDINGS 52 (1991) (emphasizing "the greatly reduced use of juries in civil trials other than for defamation proceedings" as a ground for elimination of the hearsay rule in civil proceedings.).

liar is substantially more likely to assert a statement if it is true than if it is false. This is so even if the circumstances (such as Henry's poor eyesight or the existence of a sister of Decker who looks much like her) suggest that the statement is not extremely trustworthy.

Now, consider prejudice. The statement is only prejudicial, so far as its hearsay nature is concerned, to the extent that the jury would fail to discount its value by taking into account the absence of the incidents of live testimony. But it is mere supposition to assert that the jury will fail to discount appropriately, and will do so to such an extent that the probative value actually exceeds the prejudicial impact. Such empirical evidence as there is provides no support for the proposition that juries under-discount *at all*—and it suggests that they might even over-discount.<sup>23</sup>

I do not put out of mind the possibility that in some cases, because the jury may fail to discount on the basis of the absence of the incidents of live testimony, hearsay evidence might be more prejudicial than probative. But I think that such cases are relatively rare, not enough to warrant a presumptive exclusion of hearsay. Put another way, assuming that live testimony of the declarant would be more probative than prejudicial, then the hearsay statement will also be more probative than prejudicial in most cases—not only those in which the hearsay statement is particularly trustworthy.

In the usual case, then, it is extremely likely that admission of the statement will be net beneficial to truth determination. It is conceivable that, although the statement itself is more probative than prejudicial, exclusion of the statement will induce the proponent, and future proponents in a like situation, to introduce evidence that is better yet. Given the assumption governing this part of my analysis that the declarant is (and at all material times was) unavailable, that better evidence cannot consist of the live testimony of the declarant. But it could conceivably include more complete evidence concerning the declarant and the making of the statement—"foundation facts"<sup>24</sup>—or the testimony of another observer. In most cases, though, these possibilities will not be enough to make exclusion superior to admission for the purpose of truth determination. This is because the proponent will have full incentive to present such supplemental or alternative information if it helps his case, and the opponent will have

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23. See, e.g., Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655, 657 (1992); Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 691, 695-96 (1992); Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitnesses and Hearsay Evidence*, 76 MINN. L. REV. 703, 705 (1992).

24. Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1341 (1987).

a similar incentive to present the information if it helps his case. Absent substantial inability of the opponent to present supplemental information diminishing the force of the hearsay, truth determination will be assisted by admitting the hearsay and allowing the parties to add such information as they find helpful.

I have argued that hearsay doctrine does a poor job of assisting truth determination. Now, I will argue that truth determination is effectively all that hearsay doctrine needs to be worried about with respect to a statement like Henry's. Even assuming that Henry's statement is more probative than prejudicial, notwithstanding the absence of the incidents of live testimony, Decker may argue that it should not be admitted because she did not have the ability to cross-examine him. But so what? If the evidence presented by Whitley were not a statement by her late husband but photos of an automatic bank camera showing Peters and Decker together on July 5, 1997, Decker would not have a serious objection based on her inability to cross-examine the camera.

We admit all sorts of evidence that might be considered the observations of nonhuman observers—not only of bank cameras but also of thermometers and clocks, of parrots and bloodhounds. And these observations might be considered merely a particular form of trace evidence; an event or condition leaves a trace on some entity, the trace being significantly more probable to be left assuming that some proposition at issue is true than assuming that proposition is false.<sup>25</sup> My point is not that all these types of evidence ought usually to be admitted; often, presumably, they should not be.<sup>26</sup> But we deal with such evidence by assessing its probative value and its prejudicial impact, and if the former is greater than the latter we do not exclude the evidence because it is impossible to cross-examine the entity that bares the significant trace.

I believe the same analysis can be applied to statements made by human observers. In a case like Henry's, something—assertedly the event or condition described by the statement—has caused the observer to make the statement, and so the statement might be

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25. See BERNARD ROBERTSON & G.A. VIGNAUX, *INTERPRETING EVIDENCE: EVALUATING SCIENTIFIC EVIDENCE IN THE COURTROOM* 3 (1995) (summarizing Locard's Principle: "Every contact leaves a trace. Whenever any two objects come into contact with one another they affect one another in some way."). See also C.G.G. AITKEN, *STATISTICS AND THE EVALUATION OF EVIDENCE FOR FORENSIC SCIENTISTS* 1 (1995) (stating a similar proposition).

26. Cf. Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15 (1990) (counseling greater caution in admitting bloodhound evidence); Andrew E. Taslitz, *A Practitioner's Guide to Dog Scent Lineups*, 28. CRIM. L. BULL. 218 (1992) (challenging judicial deference to dog scent lineup evidence).

deemed a trace of whatever that causal event or condition may be. Indeed, cognitive psychologists have long spoken of "memory traces," a term reflecting the impact of the remembered event on the brain.<sup>27</sup> I do not, of course, mean to suggest that human communication is no more complex than a bloodhound's communicative bark or a thermometer's display, but the question remains why the unavoidable absence of the declarant from the witness stand should lead to exclusion of her statement.

If it were possible to cross-examine the observer, that would raise another consideration, which I will address shortly. But in a case like Henry's, that is not possible. Certainly, Decker would have liked to cross-examine Henry—but that, through no fault of Decker's, is not possible and never was during the course of the litigation.

The situation would also be significantly different if the statement were prepared for the litigation, for then the adjudicative system could not treat it as a trace of some external cause or condition; the statement would be in large part a product of the adjudicative system itself. But Henry's statement was not prepared for the litigation. So far as it appears, the statement is merely the trace of an event on a human observer, of a kind with which adjudicative factfinders, who deal all the time with human communication, are particularly familiar and comfortable. Unfortunate as Decker's inability to cross-examine Henry may be, it provides no reason to exclude the statement, assuming the statement would assist in the determination of truth.

I have postponed until now any consideration of necessity. What I have said already, I think, indicates the inappropriateness of necessity as a criterion for determining the admissibility of hearsay like Henry's. Necessity might be a reasonable criterion if something valuable (but not of some absolute interest that is beyond compensation) were lost by admitting hearsay; then, only if there were some countervailing value—some necessity—should the hearsay be admissible.<sup>28</sup> But that, it seems to me, is not the case here. Only truth determination is at stake here. If a material proposition is in dispute, then there is a need for all evidence that is helpful to determine the truth of that proposition. It is not satisfactory to say, in effect, "Even though this evidence substantially alters the probability of the proposition at issue, even in light of all the other evidence we have on point, we don't want to hear this evidence because we

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27. See, e.g., DANIEL L. SCHACTER, *STRANGER BEHIND THE ENGRAM: THEORIES OF MEMORY AND THE PSYCHOLOGY OF SCIENCE* 179 (1982).

28. Cf. Callen, *supra* note 15, at 95 & n.229 (finding unpersuasive a necessity argument amounting to a contention that, because of the absence of other evidence supporting the proponent, otherwise inadmissible evidence ought to be admitted).

already have so much.”<sup>29</sup> Even if other evidence would be more probative than Henry’s statement, that does not mean that Henry’s statement is not helpful to truth determination. On the other side of the coin, if the item of evidence is net detrimental to the truth determination process, there is no need for it. In short, all evidence is necessary to the degree that its probative value exceeds any prejudicial impact it is likely to have. I do not believe that necessity adds anything to the analysis of whether the statement is beneficial for truth determination.

I have argued in this part of my analysis that when the declarant is unavailable, admission of hearsay will usually assist the truth determination process if live testimony of the declarant would have done so. Another complexity is added if the declarant is available.

### **B. The Available Declarant**

Now vary Henry’s hypothetical in one simple respect: He would be easily available as a witness.

This factor may alter the situation significantly. Even though the evidence of Henry’s statement is more probative than prejudicial, Henry’s live testimony—perhaps supplemented by evidence of his out-of-court statement—would presumably be better. And exclusion of the out-of-court statement if Henry is not produced might induce Peters to produce him as a witness.

In analyzing this situation, though, I would still put emphasis on the fact that Henry’s statement is a form of trace evidence. That is, Decker’s ability to cross-examine Henry is important, but only so far as it assists truth determination. Peters has decided that the evidence that is sufficient for his purposes, and most cost-effective, is Henry’s out-of-court statement, and presumably that evidence is more probative than prejudicial. The burden should ordinarily be on Decker to produce Henry as a witness, whether by compulsion or by persuasion, if she really believes that doing so would help truth determination.

I have previously suggested a procedure that, I believe, would assist an opponent in Decker’s position: If she produces the declarant in a timely manner, the proponent must make the declarant a witness as part of his case or forgo use of the hearsay.<sup>30</sup> This procedure would

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29. Of course, a court might appropriately say that a given piece of evidence is cumulative, but that is a different matter. A given item of evidence is cumulative if it would have significant probative value absent some other body of evidence but, because that other body of evidence accomplishes much of what the given item would, it does not in fact have significant probative value.

30. See Richard D. Friedman, *Improving the Procedure for Resolving Hearsay Issues*.

help the opponent by allowing her to examine the declarant during the proponent's case, without the need of interrupting her case to secure a repetition of the declarant's story and elevating jury expectations by making the declarant a witness. On further reflection, I doubt this procedure should be used universally. I do not believe the practical concerns with operating it are insuperable,<sup>31</sup> but in some cases I believe it concedes more to the opponent than is necessary. It may be that truth determination is better advanced by allowing the proponent to make his case using the evidence he deems appropriate, and then allowing the opponent to present the evidence she feels will help her case—which may include the live testimony by the declarant—even though it was the proponent who offered the declarant's prior statement. Presumably the opponent is better off questioning the declarant in the middle of the proponent's case rather than as part of her own, but given that the proponent is satisfied to rest on the out-of-court statement of the declarant, it is not clear that the opponent ought to have the opportunity to interrupt.<sup>32</sup> But, under

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13 CARDOZO L. REV. 883 (1991).

31. The procedure is subject to some abuse if a wealthy opponent obfuscates a proponent's case by securing the presence of all the proponent's hearsay declarants. This problem could be addressed on those occasions when it appears to arise; in most cases, it would be apparent that this problem is not substantial. The procedure also depends on the proponent giving sufficient advance notice of intention to use a hearsay declaration, and in some cases this may be a problem. Again, I believe the difficulty may be addressed case by case. The proponent might argue persuasively in some cases that he could not have been expected to give earlier notice, and in such a case if production of the declarant is unfeasible she probably should be deemed to be unavailable.

32. Immediate cross-examination is itself, of course, an interruption. No serious suggestion has been made, within the Anglo-American system, that in general the opponent's right to subject a live witness to adverse examination should be delayed until the proponent has rested. Some jurisdictions do limit the scope of cross-examination to matters covered in direct, and the reason seems to be to prevent the opponent from creating an excessive interruption in the proponent's case. Thus, there is a tension between allowing the proponent to present a relatively unobstructed case and allowing the opponent a prompt, convenient opportunity to respond. See generally 1 MCCORMICK ON EVIDENCE 83-95 (4th ed. 1992) (discussing varying practices regarding the permissive scope of cross-examination).

In an unpublished paper, I have made the suggestion that, within the current framework of hearsay law, lawmakers might create an exception under which a proponent could exempt a statement from the rule against hearsay by voluntarily invoking a procedure much like the one I previously proposed. Under this proposal, the proponent could, if he chose, give sufficient notice of his intention to use the out-of-court statement. If the proponent did so, and if the proponent was not substantially better able than the opponent to produce the declarant, the statement would be admissible unless the opponent, by a designated time, produced the declarant, willing and able to testify. If the opponent did so, the proponent would either have to put the declarant on the stand as part of his own case or forgo use of the hearsay. See Richard D. Friedman, *A Subversive Exception to the Hearsay Rule* (unpublished manuscript, on file with the author).



the procedure I have previously suggested or, assuming that is unnecessary, under the traditional procedure, if the hearsay is more probative than prejudicial and the proponent is not substantially better able than the opponent to produce the declarant, the hearsay should be admitted.

The situation is somewhat different if the proponent is substantially better able than the opponent to produce the declarant. In such a case, even if the hearsay is more probative than prejudicial, efficient truth determination might be aided by excluding the hearsay, thus inducing the proponent to produce the declarant as a live witness. Even in such a case, however, I think a court should hesitate before concluding that exclusion is necessary. It may be that other remedies, such as judicial or adversarial comment on the proponent's failure to produce the evidence, might suffice to give the proponent the proper incentive without requiring the exclusion of evidence that might assist the search for truth. If hearsay evidence is excluded on the ground that it will cause the production of better evidence by the proponent—live testimony—it will often be a failed bluff. The proponent's reaction to the exclusion may be to forgo use of the evidence rather than to produce the declarant as a live witness, thus leading to a result that is worse with respect to the very goal that exclusion was meant to foster: truth determination.

### III. The Confrontation Setting

Now I will consider a setting, dramatically different from Henry's case, in which a criminal defendant's confrontation rights are at stake. In this context, I believe, considerations other than truth determination are at stake, but the Supreme Court has not recognized this. I will take as my keynote *Lee v. Illinois*.<sup>33</sup> There, the defendant Lee's boyfriend, Thomas, confessed to having committed a double murder with her. At Lee's trial, though, Thomas invoked the privilege against self-incrimination, and so the prosecution introduced the confession instead of his testimony.

Given Thomas's refusal to testify, did use of the confession assist truth determination? I think the answer is plainly in the affirmative. His confession was highly probative. Thomas confessed to full complicity in two murders. The statement seems to have been in accordance with all the physical evidence, and it also squared in some crucial respects with a statement made by Lee herself, the only other surviving witness to the events at issue. The key difference is that Thomas's statement, rather than trying to deflect culpability from himself, indicated a greater degree of culpability on the part of both

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33. 476 U.S. 530 (1986).

himself and Lee. Taking these factors together, I believe—contrary to a narrow majority of the Supreme Court—that the confession meets a high standard of reliability. But even if this is not so, it seems clear that truth determination would be assisted by giving the jury knowledge of Thomas's statement. Indeed, the contrary position seems to be almost laughable.

And yet it also seems clear to me that the 5-4 majority of the Supreme Court came to the correct result: Thomas's statement should not have been admitted against Lee. Exclusion was justified on grounds other than truth determination. Imagine for a moment that statements like Thomas's were admissible. Then making a statement to the police for use in investigating and prosecuting the accused would in effect become an acceptable form of testifying against the accused, without any need for cross-examination by the accused. People in the position of Thomas would understand that by making statements to the police, or even to intermediaries between themselves and the police, they would be creating evidence that might well be used to convict a criminal defendant.

It is helpful in this context to focus on the language of the Confrontation Clause of the Sixth Amendment to the Constitution. Supreme Court decisions sometimes seem to read the Clause as having incorporated Article VIII of the Federal Rules of Evidence.<sup>34</sup> But in fact, the Clause says nothing about hearsay. Rather, it guarantees the right of the accused "to be confronted with the witnesses against him."<sup>35</sup> At the same time, it is important to bear in mind that not all testimony need occur in the courtroom. This, I believe, is why Confrontation and hearsay concerns often overlap and are often confused. Indeed, it appears rather clear that the principal danger against which the Clause was aimed was not the possibility that an accused would be denied the opportunity to cross-examine a witness who testified at trial. Rather, the concern was the practice by which some witnesses had testified out of court and out of the presence of the accused. This was the standard procedure in the canonical courts, in the old courts of Continental Europe, and in equity courts. It was a practice which the common law courts, and advocates of the common law system, resisted stoutly.<sup>36</sup> Beginning in

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34. See, e.g., *White v. Illinois*, 502 U.S. 346, 352-53 (1992).

35. U.S. CONST., amend. VI

36. See, e.g., *Case of the Union of the Realms*, 72 E.R. 908, 913 (1604). Interestingly, at the same time, at least in civil cases, the common law courts found the deposition procedure of equity to be very useful when a witness was not able to testify at trial. But by the middle of the seventeenth century a sophisticated body of law—remarkably similar to the modern FED. R. EVID. 804(b)(1)—had evolved restricting the circumstances in which depositions might be used, thus protecting the adversary's right of cross-examination. See, e.g., *Fortescue v. Coake*, Godb. 193, 78 E.R. 117 (Com. Pleas 1612); *Anon.*, Godb. 326, 78

the middle of the sixteenth century, long before any rule against hearsay had gelled, we find a drumbeat of demands by defendants, recurrently supported by Parliament, for "face-to-face" confrontation.<sup>37</sup>

Now, if Thomas's statement to the police were admissible against Lee, Thomas would effectively be testifying against Lee, behind closed doors, not under oath, and with no opportunity for cross-examination. That is intolerable, so long as Thomas's failure to testify at trial under oath and subject to cross-examination was not procured by Lee's own wrongdoing. Suppose Thomas testified in court against Lee, but before he could be cross-examined he died suddenly, through no fault of any of the parties. I do not believe there would be much doubt that Thomas's direct testimony would have to be struck and could not support a verdict—even if it seemed highly reliable.<sup>38</sup> Why should it be any different if Thomas testifies out of court, and if the cause of his unavailability for cross-examination is privilege rather than death?

I am suggesting here that the accused's right to confront the maker of a testimonial statement is not limited to a truth-determination basis. I believe that the right should be absolute, subject only to forfeiture for misconduct.<sup>39</sup> Why?

Presumably confrontation does assist truth determination, and that is important, especially given that the evidence at stake is offered by the prosecution. Recall that for prosecution evidence to be admissible it must be supported by a very high ratio of error avoidance to error creation. A practice that is good in most cases for truth determination can become a norm that develops into a right. But I believe the confrontation right has standing of its own, and it should apply even where doing so hurts truth determination.<sup>40</sup>

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E.R. 192 (K.B. 1623); *Rushworth v. Countess de Pembroke*, Hardres 472, 145 E.R. 553 (Ct. Exchequer 1668).

37. See, e.g., *Seymour's Case*, 1 How. St. Tr. 483, 492 (1549); *Duke of Somerset's Trial*, 1 How. St. Tr. 515, 517, 520 (1551); 5 & 6 Edw. 6 ch. 11, § 12 (1552) (Eng.); 1 & 2 Phil. & M. ch. 10, § 11 (1554) (Eng.).

38. See *Commonwealth v. Kirouac*, 542 N.E.2d 270, 273 & 273 n.5 (Mass. 1989) (reversing conviction for indecent assault and battery on a child under 14 when child refused to answer questions under cross-examination).

39. See, e.g., *Illinois v. Allen*, 397 U.S. 337 (1970) (holding that defendant can lose his right to be present at his trial if his disruptive behavior continues after proper warning). Forfeiture may also occur if misconduct renders the potential witness unable to testify at trial. Cf. FED. R. EVID. 804(b)(6). I have written on forfeiture in *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997).

40. Callen discusses confusion between the value of cross-examination and the inferential processes it serves. See Callen, *supra* note 15, at 94. Outside the confrontation context, I have argued in this paper that our preeminent concern should be for truth determination and the inferential processes that play a part in it. If admitting a statement

A testimonial statement is not mere trace evidence. It is not merely a consequence of the events at issue; the pending prosecution itself had a role in its creation. As in *Lee*, it is made with the anticipation (and sometimes also the desire) that it will assist in the prosecution of a crime. It may also have been made, as in *Lee*, at the instance, or with the participation, of prosecuting authorities. The essence of a trial—a test—is the testing of evidence. To allow testimony, whether given in court or not, to be presented to the factfinder without giving the accused the opportunity to confront the witness would deprive the accused of the testing that a trial is supposed to provide. This is not a new idea, or one limited to the common law system; its origins go back to Roman times and before.<sup>41</sup> It is not sufficient to say that an accusatory statement should be admitted because it assists truth determination. The right to test the testimony is valuable in itself.

### Conclusion

I have focused on two polar cases. One is a civil case in which I believe that the hearsay statement should clearly be admitted because it assists truth determination. The other is a criminal case in which prosecution evidence that is testimonial in nature should be excluded notwithstanding the fact that it would assist in truth determination. Trying to determine just what are the decisive differences between these two cases is not an easy matter. I have put a great deal of weight on the concept of testimonial statements, because it is with respect to these that I believe values other than truth determination become decisive. I have not tried to define “testimonial” precisely. In *Lee*, the statement was made with the anticipation that it would be used for prosecution. I believe that should be enough, even without prosecutorial participation in the creation of the statement, but this is

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that has not been subjected to cross-examination assists the search for truth, the statement should be admitted. But I am arguing that in the confrontation setting the right to cross-examination, as well as the right to ensure that testimony is made openly and under oath, do not merely serve the inferential process.

41. The Book of Acts quotes the Roman governor Festus as declaring: “It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have licence to answer for himself concerning the crime laid against him.” *Acts* 25:16, (King James 1607). See also *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988). Nor was it the practice of the Hebrews. The book of Deuteronomy requires multiple witnesses for convictions. See *Deut.* 19:15-19. And yet it was sometimes held sufficient to have a single witness to each of several recurrences of the same crime. The Essenes, the people of the Dead Sea Scrolls, took advantage of this rule by preserving the testimony of an accusing witness, in the form of a deposition taken in the presence of the defendant. See generally Lawrence Schiffman, *The Law of Testimony, in* SECTARIAN LAW IN THE DEAD SEA SCROLLS (1983).

a difficult point and I have not argued it here.<sup>42</sup>

And what of intermediate cases? In criminal cases as well as in civil, much hearsay is not testimonial, and this should be treated hospitably, especially, given the analysis in Part I, when it is offered by the defense.

The more difficult problems, it seems to me, are posed by testimonial out-of-court statements offered by civil litigants or by criminal defendants. There is certainly some argument for saying that these litigants, like a prosecutor, should not be able to create out-of-court testimonial statements that they will then use at trial without cross-examination. On the other hand, neither the constitutional right of confrontation, nor the long history associated with it, support exclusion in these circumstances. When a criminal prosecutor offers a testimonial statement, the asymmetrical balance of power and the asymmetry of the stakes suggest that it is the prosecutor who ought to bear the risk that, through the fault of neither party, the witness will be unable to testify at trial. These factors will not generally be present when the proponent is a civil litigant or a criminal defendant. Moreover, it certainly makes sense for private parties to be able to prepare documents, such as receipts and written memoranda of agreements, with the idea that they will be used as evidence should matters turn into a litigated dispute; it is not clear that statements prepared for evidentiary use, after matters have indeed turned to litigation, should be treated differently. I find this a perplexing problem and there, for the moment, I will leave it.

In any event, my essential thesis is this: The theme of "truth and its rivals" provides a useful perspective for considering how the law of hearsay should be revamped. In most contexts, truth determination—minimizing the cost of inaccuracy—should be the pre-eminent consideration governing evidentiary law, and this weighs in favor of admitting hearsay. But when evidence that is testimonial in nature is offered against a criminal defendant, another value, the longstanding right of the accused to confront the witness against him, demands the exclusion of some evidence even though it might assist the search for truth.

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42. I pursue the matter further in another article. Richard D. Friedman, *Confrontation: The Search for First Principles*, 86 GEO. L.J. 1011 (1998).